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JUN 1961

IN THE

Supreme Court of the United States

October Term, 1961.

No. [redacted].

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 981.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Second Circuit is reported at 288 F.2d 579, and is printed in Appendix A to the Petition. The prior opinion of the Court of Appeals for the Second Circuit directing the dismissal of petitioner's appeal to that court and on rehearing vacating the order of the District Court for the Southern District of New York to enable petitioner to invoke the jurisdiction of the Court of Appeals *nunc pro tunc* under the

Interlocutory Appeals Act, 28 U.S.C. 1292(b), is reported at 273 F.2d 729. The opinion of the District Court for the Southern District of New York is reported at 175 F. Supp. 793 and is printed in Appendix C to the Petition.

QUESTION PRESENTED.

Does Section 1406(a) of the Judicial Code permit a district court to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants?

STATUTE SOUGHT TO BE INVOKED.

Petitioner seeks to invoke Section 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a), in support of its contention that a district court has the power to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants. Section 1406(a) provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

STATEMENT OF THE CASE.

Petitioner instituted this private antitrust action in the United States District Court for the Eastern District of Pennsylvania against numerous corporate and individual defendants including respondents, Select Operating Corporation and United Booking Office, Inc., on October 17, 1956.[1] Thereafter, respondents and others filed timely motions to dismiss the action for lack of jurisdiction over their persons, to dismiss for improper venue and to quash the returns of service. Petitioner has conceded that the District Court for the Eastern District of Pennsylvania never acquired jurisdiction over the persons of respondents.[2]

On December 22, 1958, the District Court for the Eastern District of Pennsylvania, Kraft, J., rendered an opinion in which the motions of respondents to dismiss for improper venue were granted on the ground that neither was an inhabitant, nor was found nor transacted business in the Eastern District of Pennsylvania within the meaning of Section 12 of the Clayton Act, 15 U.S.C. § 22.[3] Be-

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1. On February 18, 1957, petitioner instituted a second action in the Eastern District of Pennsylvania which differed from the first only to the extent that the second added certain defendants and sought to extend the period for which damages were claimed. The cases subsequently were consolidated and can be treated together for the purpose of the instant Petition.

2. Petitioner has never contended that the purported service of process which petitioner attempted to make upon respondents in the Eastern District of Pennsylvania was effective. Nor has petitioner challenged in the Court of Appeals or in the instant Petition the holding of the district court below that the extraterritorial service of process upon respondents in the Southern District of New York was insufficient to subject them to the jurisdiction of the Pennsylvania court.

3. At the same time, motions to dismiss for lack of personal jurisdiction, improper venue and to quash returns of service were denied with respect to J. J. Shubert, John Shubert and Select Theatres Corporation as to whom (and others) petitioner's action presently is pending in the Eastern District of Pennsylvania.

fore orders were entered in accordance with the opinion, however, petitioner filed a motion to transfer the action to the District Court for the Southern District of New York. On March 3, 1959, the District Court for the Eastern District of Pennsylvania ordered the action transferred as to respondents and others[4] to the District Court for the Southern District of New York, notwithstanding the Pennsylvania court's lack of jurisdiction over the persons of respondents.

Immediately following the transfer, respondents filed motions to dismiss the action in the district court below on the ground that the transfer was invalid, improper and without statutory sanction. On August 10, 1959, the district court, Palmieri, J., rendered an opinion holding that the transfer as to respondents was invalid because Section 1406(a) of the Judicial Code does not allow the transfer of a civil action to another district when the transferor court lacks personal jurisdiction over the defendants. The remaining defendants as to whom the action was transferred filed answers to the complaint before attempting to challenge the transfer. Judge Palmieri subsequently ruled that those defendants, unlike respondents, had waived the right to contest the transfer by filing answers. As a result, the action presently is pending as to the remaining defendants in the district court below.

On September 1, 1959, Judge Palmieri entered an order dismissing the action as to respondents which expressly directed that "there is no just reason for delay and this Court directs the entry of judgment in favor of said Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman" in conformity with Federal Rule 54(b). On September 25, 1959, petitioner filed a notice of appeal to the court below, and on November 30, 1959, respondents filed a motion to dismiss the appeal on the ground that the

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4. In addition to respondents, the action was transferred as to defendants Sylvia W. Golde, Milton Shubert and William Klein.

order of the district court below was interlocutory and not appealable.

On December 29, 1959, the court below (Lumbard, C.J., Swan, J., and Friendly, J.) held that the order was not appealable because an order directing dismissal of one or more, but less than all, of multiple defendants jointly charged, does not constitute "the entry of a final judgment upon one or more but less than all of the claims" presented in a multiple claims action within the meaning of Rule 54(b).

On January 11, 1960, petitioner filed a petition for rehearing in the court below and in the alternative petitioned for amendment of the court's order to permit petitioner the right to appeal *nunc pro tunc*, under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b).[5]

On January 18, 1960, the court below denied the petition for rehearing, but vacated Judge Palmieri's order of September 1, 1959, "for the sole purpose of permitting him to 'enter a fresh decree' in which he may include the statement described in 28 U.S.C. § 1292(b) if in his full discretion he determines that such a statement is here justified." 273 F.2d at 731.

On January 27, 1960, Judge Palmieri entered an order which included the statement contemplated by the Interlocutory Appeals Act, and on February 2, 1960, petitioner

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5. The Interlocutory Appeals Act authorizes appeals from orders not otherwise appealable, provided that:

(1) The district judge includes in the order complained of the statement required by the Act; and

(2) The party seeking appellate review makes application to the Court of Appeals for leave to appeal within ten days after the entry of the order complained of; and

(3) The Court of Appeals, in its discretion, grants leave to take such an appeal.

Judge Palmieri's interlocutory order of September 1, 1959, from which petitioner sought to appeal did not contain the statement contemplated by the Act, and petitioner did not seek to invoke its provisions until January 11, 1960, four months and ten days after the entry of the order from which petitioner sought interlocutory relief.

filed an application in the court below for leave to take an interlocutory appeal. On March 7, 1960, the court below (Lumbard, C.J., Waterman, J., Moore, J., and Friendly, J., with Clark, J., dissenting) granted petitioner's application without opinion.

On February 21, 1961, the court below (Moore, J., Waterman, J., with Hincks, J., dissenting) affirmed the decision of the district court and held that Section 1406(a) does not permit the transfer of an action to another district where the transferor court lacks jurisdiction over the persons of defendants.

ARGUMENT.

The Reasons Relied Upon by Petitioner for Allowance of the Writ Do Not Justify Its Issuance.

Petitioner claims that the Writ should be allowed because the Court of Appeals' construction of Section 1406(a) is "unwarranted and unduly restrictive"[6] and because its decision conflicts with those of the Courts of Appeals for the Fourth, Ninth and District of Columbia Circuits. Neither contention has merit.

A. *The Construction of Section 1406(a) for Which Petitioner Contends Is Not Sanctioned by the Statute.*

Section 1406(a) merely authorizes the transfer of "a case laying venue in the wrong division or district." There is no warrant, statutory or otherwise, for construing that provision to permit transfer when the transferor court lacks jurisdiction over the persons of defendants. Petitioner seeks to attribute to Congress an intention which the statute does not disclose and which is not apparent from its legislative history.

As initially enacted in 1948, Section 1406(a) required transfer when venue was improperly laid. It was recognized, however, that the provision for mandatory transfer might be subject to abuse. To avoid this possibility, Congress amended Section 1406(a) in 1949 to make transfer optional in the discretion of the district court. The Senate Report states:

> "It is thought that this provision [the 1948 version of § 1406(a)] may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district *where he could get service on the defendant*, and when the question of venue is raised

6. Petition, p. 6.

> the court is required to transfer the case to the court where it 'could have been brought.' *However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue.*" (Emphasis added.)[7]

Implicit in the foregoing statement is Congress' recognition that Section 1406(a) is inoperative unless plaintiff brings suit in a district "where he could get service on the defendant" and that it is a prerequisite to transfer that "service has been perfected on a defendant in the wrong venue. . . ." Accordingly, it is clear that Congress did not intend Section 1406(a) to authorize transfer when the transferor court lacks personal jurisdiction over the defendant.

The Third Circuit agrees:

> ". . . The sole purpose of this section [1406(a)] as well as its companion, 28 U.S.C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served. The appellant here is, in effect, attempting to turn a venue provision into a device for including New York within the area where appellee can be properly served under Rule 4(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A., in an action commenced in Pennsylvania. We are satisfied that Section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand

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7. Sen. Rep. No. 303, 81st Cong., 1st Sess., U.S. Code Cong. Serv. 1253 (1949).

method for assisting a party to effect jurisdiction of the person."[8]

And as the court below correctly observed:

> ". . . . Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater."[9]

Petitioner contends that the decision below is contrary to Congressional policy to facilitate private enforcement of the antitrust laws. But Section 1406(a), which is applicable to civil cases generally, was not enacted to aid or impede antitrust cases in particular. Moreover, petitioner disregards the fact that the Congressional policy to facilitate private antitrust litigation, with which the decision below is claimed to conflict, was expressly implemented by Congress in Section 12 of the Clayton Act, 15 U.S.C. § 22, which authorizes extraterritorial service of process upon a corporate defendant transacting business in the forum. And as the court below stated, petitioner's "real difficulty here is that it has failed to meet the requirements of that section."[10]

Petitioner's assertion that the decision below will have "far reaching effect . . . for all litigants bringing suit under the many federal statutes governed by similar venue provisions"[11] is equally without basis. The decision below

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8. *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527, 529-30 (3rd Cir. 1961).

9. Petition, Appendix A, p. 6a.

10. Petition, Appendix A, p. 13a.

11. Petition, p. 8.

did not involve the construction of a venue statute. The decision below in no way inhibits petitioner's, or any private litigant's, ability to institute suit in a district in which a defendant is found or transacts business under any of the statutes cited by petitioner. On the contrary, the decision of which petitioner complains becomes operative only where, as here, a plaintiff fails to institute suit in such a district *and* fails to perfect service upon the defendant.

Finally, petitioner urges that the decision below should be overturned because of the hardship it imposes upon petitioner. But petitioner does not disclose that despite a challenge to the court's jurisdiction made by respondents in 1956 in the Eastern District of Pennsylvania, petitioner did not take the precautionary step of preserving its rights under the statute of limitations by filing suit against respondents in the Southern District of New York until August 20, 1959, subsequent to the decision of the district court below. Petitioner could have avoided the claimed hardship resulting from the decision below by the prompt prosecution of its claims in the Southern District of New York where respondents and all of the other defendants were amenable to suit, when alerted in 1956 of the jurisdictional defects attending the action instituted in Pennsylvania.

All of the arguments now advanced by petitioner in support of its contention that Section 1406(a) authorizes the transfer in the absence of personal jurisdiction were rejected by the court below. The refusal below to adopt petitioner's contention was correct because, as the court noted:

> ". . . Any attempts by the courts to enact by their decisions so radical a procedural innovation, particularly where the effect of such decisions is to narrow the requirement of jurisdiction over the person, would invade legislative territory." [12]

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12. Petition, Appendix A, p. 13a.

Respondents submit that the construction of Section 1406(a) adopted by the court below is the only one sanctioned by the statute. For this reason alone the Petition should be denied.

B. *The Decisions of the Courts of Appeals Are Not in Conflict.*

The decision below is asserted to conflict with the decisions of the Fourth, Ninth and District of Columbia Courts of Appeals. Respondents submit that the decisions relied upon by petitioner as conflicting with the decision below and that of the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc., supra*, are either inapplicable or the proposition for which they are cited by the petitioner was not in issue or was conceded without argument in those cases.

Petitioner's citation of *Orion Shipping and Trading Company v. United States*, 247 F.2d 755 (9th Cir. 1957), is typical. *Orion* was an appeal from the dismissal of third party proceedings instituted by a ship owner against the United States under the Federal Tort Claims Act seeking to compel contribution with respect to plaintiff's common law judgment for injuries sustained as a result of the unseaworthiness of defendant's vessel. The United States claimed that venue was improperly laid since Orion did not reside or have its principal place of business in the district in which suit was instituted. The Court of Appeals held that the dismissal was erroneous and remanded with directions to transfer the action pursuant to Section 1406(a) of the Judicial Code. *Orion* in no respect involved the power of the district court to transfer in the absence of personal jurisdiction. There, the transferor court had jurisdiction over the person because the third party defendant had "appeared and answered." 247 F.2d at 758.

Petitioner likewise seeks to create the impression that *American Contact Plate Freezers, Inc. v. Knowles*, 274 F.2d 590 (D.C. Cir. 1960), held that Section 1406(a) authorizes

transfer in the absence of personal jurisdiction. Although the language quoted by petitioner appears to conflict with the decision below, the proposition for which it is cited was there conceded without argument. In *Amerio*, the plaintiff brought suit in a district in which venue was improperly laid. In addition, it appeared that the plaintiff failed to make proper service of process on the defendant. The lower court granted defendant's motion to dismiss for lack of jurisdiction and denied plaintiff's motion to transfer pursuant to Section 1406(a). On appeal, appellee, the defendant below, argued merely that the transferor court lacked jurisdiction over the *subject matter of the action*, and that, as a result, the district court was powerless to order the transfer. In fact, the appellee expressly conceded that the transferor court's lack of personal jurisdiction over the appellee was no bar to the requested transfer.

> "Appellant relies on *Schiller v. Mit-Clip Co.* . . . as standing for the proposition that a civil action may be transferred to another district to correct venue where the transferring district has jurisdiction of the subject matter of the action, but not of the person of the defendant. *We do not disagree with the statement of the rule.* . . .
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>
> "It is appellee's position that . . . special jurisdictional prerequisites . . . were not met in this case and that because of this fact the District Court for the District of Columbia *obtained no jurisdiction over the subject matter of this action. It accordingly properly refused to transfer the case and dismissed the action.*" (Emphasis added.) [13]

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13. Appellee's Brief on Appeal in *Amerio Contact Plate Freezers, Inc. v. Knowles*, in the United States Court of Appeals for the District of Columbia Circuit, No. 15,150, pp. 12-13, 15.

Accordingly, petitioner's reliance upon *Amerio* is unwarranted because the proposition for which petitioner cites *Amerio* was there conceded without argument. And in *Hayes v. Livermont*, 279 F.2d 818 (D.C. Cir. 1960), the question of whether a district court has the power to transfer in the absence of personal jurisdiction does not appear to have been in issue.[14]

Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955), also relied on by petitioner, was an admiralty action. As Judge Staley, speaking for the court in *Hohensee v. News Syndicate, Inc., supra*, stated (p. 530, n. 6):

> ". . . Admiralty cases . . . are inapposite for the reasons succinctly stated in another admiralty case

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14. *Hayes v. Livermont* relies only on *Amerio* and *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955) which is inapplicable for the reasons set forth *infra*. *Amerio* in turn is primarily derived from a misconception of *Schiller v. Mit-Clip Co.*, 180 F.2d 654 (2nd Cir. 1950). And as the court below observed with respect to its earlier decision (Petition, Appendix A, p. 10a):

> "*Schiller* cannot correctly be accepted, as it appears it mistakenly has been, for the proposition that section 1406(a) authorizes transfer in the absence of personal jurisdiction of a defendant. In that case the defendants moved to dismiss for lack of personal jurisdiction and improper venue. It was the court which *sua sponte* ordered the transfer. However, on appeal the plaintiff objected to the transfer and the defendant argued in support of the transfer. In assessing that case, it must be recognized that personal jurisdiction requirements are for the benefit of defendants. If a defendant chooses to waive such jurisdictional objections, he may. Thus, any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the transferor court by arguing for the transfer. No such waiver of jurisdictional objections here exists."

appellant cites, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 1955, 218 F.2d 514, 515, where Judge Parker said:

> 'As the suits were in admiralty, they might have been instituted in any district court of the United States. * * * It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly * * *.'"

Moreover, as Judge Parker noted in *Internatio*, venue is a concept foreign to admiralty (218 F.2d at 516, n. 1):

> "A suit in admiralty must be distinguished in this respect [institution of suit] from a civil action based on diversity of citizenship in which venue is limited by statute."

Accordingly, since the venue of antitrust suits, like diversity actions, is limited by statute,[15] *Internatio* cannot conflict with the decision below.

Respondents submit that the decisions relied upon by petitioner are not in conflict with the decision below because such decisions are either inapposite or the proposition for which they are cited by petitioner was not in issue or was conceded without argument in those cases.

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15. Clayton Act, Sections 4 and 12, 15 U.S.C. §§ 15, 22.

CONCLUSION.

The decision below is clearly correct and the decisions of the Courts of Appeals are not in conflict. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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